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In the Supreme Court of the United States

OCTOBER TERM, 1983

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF ADA E. VAN HORNE, DECEASED, ROBERT L. FARMER AND RICHARD R. COLE, EXECUTORS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Section 2053(a)(3) of the Internal Revenue Code provides that, in determining the net estate subject to federal estate tax, a deduction shall be allowed "for claims against the estate." The question presented is whether this Section permits an estate to deduct its date-of-death, actuarial estimate of the amount of a claim, or whether its deduction should be limited to the lesser amount actually payable and actually paid, in light of events occurring after the decedent's death, to satisfy the claim in full.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is reported at 720 F.2d 1114. The opinion of the Tax Court (App., *infra*, 9a-29a) is reported at 78 T.C. 728.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 8a) was entered on November 22, 1983. On February 16, 1984, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and in-

cluding March 20, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

The relevant portions of Section 2053 of the Internal Revenue Code of 1954 (26 U.S.C.), and of Section 20.2053 of the Treasury Regulations on Estate Tax (26 C.F.R.), are set out in a statutory appendix (App., *infra*, 30a-31a).

STATEMENT

Ada E. Van Horne died on September 4, 1976. At that time, she was obligated under a divorce decree to pay her ex-husband, James, spousal support of $5,000 per month for the remainder of his life. The divorce decree provided that this obligation would not be modified by James's remarriage or by Ada's death, and that upon her death it would become a charge against her estate. App., *infra*, 9a-10a.

On October 29, 1976, James timely filed a creditor's claim for continuation of his monthly support payments (App., *infra*, 10a). His claim sought "$5,000 per month for the balance of [his] life," and was approved by the probate court two months later (TCX 4-D; App., *infra*, 10a). James's claim for support had a stipulated actuarial value, based on his life expectancy, of $596,387 at the date of Ada's death. App., *infra*, 11a; see Treas. Reg. § 20.2031-10 Table A(1).

James was suffering from a liver ailment when Ada died, but he had no reason to believe that he was terminally ill. In March, 1977, however, six months after her death, his health began to decline and he was hospitalized. App., *infra*, 3a, 10a. He died of liver cancer on April 20, 1977, after receiving only $35,000 from Ada's

estate pursuant to the spousal support decree (App., *infra*, 2a-3a, 11a).

Ada's executors timely filed a federal estate tax return on June 1, 1977. Section 2053(a)(3) of the Code[1] provides that, in determining the net estate subject to estate tax, there shall be allowed a deduction "for claims against the estate." Relying on that Section, the estate took a deduction in the amount of $596,387—the full actuarial value of James's claim for support, computed as of the date of Ada's death—on account of the estate's spousal support obligation (App., *infra*, 11a). The Commissioner on audit disallowed the bulk of this deduction, determining that only $35,000—the amount actually payable, and actually paid, to James in complete satisfaction of his claim— was properly deductible under Section 2053(a)(3) (App., *infra*, 2a-3a). Based upon this and other determinations, the Commissioner asserted a deficiency in federal estate tax of $448,828 (TCX A).

The executors sought a redetermination of the deficiency in the Tax Court, which upheld the estate's actuarial computation of the deduction (App., *infra*, 9a-29a). The Tax Court discerned "much confusion and diversity of views" as to the role of post-death events in computing estate tax deductions (*id.* at 19a), finding the cases "not easily reconciled with one another" and comparing the search for a consistent course of decision to "picking one's way through a minefield" (*id.* at 21a). The court acknowledged that consideration of post-

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[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

death events would be proper if James, at Ada's death, had held "only a potential, unmatured, contingent, or contested claim that required further action * * * before it became a fixed obligation of the estate" (*id.* at 19a). In cases of contested or contingent claims, the court reasoned, post-death developments must necessarily be consulted because they "determine whether or to what extent such 'claims' actually ripen[] into enforceable claims that [can] be deducted at all" (*id.* at 16a-17a). But the court distinguished such cases, asserting that the issue involved here was not "the *enforceability* of the claim," but "the *valuation* of an enforceable claim" (*id.* at 16a (emphasis in original)). Viewing the issue as one of valuation, the Tax Court believed its decision to be controlled by this Court's reasoning in *Ithaca Trust Co.* v. *United States*, 279 U.S. 151 (1929), which involved the valuation of a charitable bequest rather than of a claim against the estate. Based on its interpretation of *Ithaca Trust*, the Tax Court held that "the value of James'[s] life interest [must] be computed actuarially as of the date of the decedent's death and not on the basis of his unexpected death seven months thereafter" (App., *infra*, 19a).[2]

The Ninth Circuit unanimously affirmed (App., *infra*, 1a-7a). It noted "the conflicting authorities and commentators who have addressed this issue," but found "those authorities holding post-death events ir-

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[2] Although the Tax Court upheld the estate's position on the Section 2053(a)(3) issue, it determined a deficiency against the estate on the basis of other items (App., *infra*, 25a-29a), and its determination in the latter respect was upheld by the court of appeals (App., *infra*, 6a-7a). The Commissioner presents the Section 2053(a)(3) question alone for review.

relevant * * * to be persuasive" (*id.* at 4a-5a n.1). The court held " 'as a matter of law [that], when claims are for sums certain, and are legally enforceable as of the date of death, post-death events are not relevant in computing the permissible deduction.' " *Id.* at 4a (quoting *Propstra* v. *United States*, 680 F.2d 1248, 1254 (9th Cir. 1982)).

REASONS FOR GRANTING THE PETITION

The court of appeals has decided an important question of federal tax law in a way that conflicts with the decisions of at least five other circuits. The decision below is erroneous, permitting respondent to deduct $596,000 on account of a claim that it satisfied in full by paying only $35,000. The issue recurs frequently, since questions as to the effect of post-death events on claims against the estate arise in virtually every estate tax audit. Review by this Court is therefore appropriate.

1. In holding that post-death events are irrelevant, as a matter of law, in determining the amount deductible under Section 2053(a)(3) on account of a surviving spouse's claim for alimony, the decision below squarely conflicts with decisions of the Second Circuit and the former Court of Claims. In *Estate of Chesterton* v. *United States*, 551 F.2d 278, cert. denied, 434 U.S. 835 (1977), the Court of Claims held that, where the estate's obligation to pay alimony is terminated by the surviving spouse's remarriage, the estate may not deduct the full date-of-death actuarial value of the spouse's alimony claim, but may deduct only the (lesser) amount actually paid in satisfaction thereof (551 F.2d at 279-282). The Second Circuit had previously reached the same result, on substantially identical

facts, in *Commissioner* v. *Estate of Shively*, 276 F.2d 372 (1960). It held that "where, prior to the date on which the estate tax return is filed, the total amount of [the surviving spouse's alimony] claim against the estate is clearly established under state law, the estate may obtain * * * no greater deduction than the established sum, irrespective of whether this amount is established through events occurring before or after the decedent's death" (276 F.2d at 375).[3]

The decision below likewise conflicts with a long line of cases holding post-death events relevant in determining the validity and amount of "claims against the es-

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[3] The Tax Court attempted to distinguish these cases (App., *infra*, 23a-24a n.8) on the ground that the alimony was terminated there "by a wholly volitional act, namely, remarriage," whereas the alimony was terminated here by the surviving spouse's death. This is a distinction without a difference. The Tax Court speculated that the *Chesterton* and *Shively* courts might have rejected date-of-death valuation because the "volitional" nature of the post-death event made an actuarial estimate of the alimony claim difficult. See App., *infra*, 24a n.8. This speculation is unfounded. In fact, the parties stipulated as to the actuarial value of the surviving spouse's alimony claim in each case. See 551 F.2d at 278; 276 F.3d at 373-374. See also *Gowetz* v. *Commissioner*, 320 F.2d 874, 875 (1st Cir. 1963) (noting that the parties had stipulated as to the actuarial value of the surviving spouse's alimony claim, but fi ling it unnecessary to reach the question presented here). Moreover, even if the "volitional" nature of the post-death event would complicate date-of-death valuation on the facts of a particular case, that difficulty would not make any difference in determining whether post-death events are relevant in valuing "claims against the estate" as a matter of law. Obviously, a claim terminable by a "volitional" act would have to be evaluated in *some* way for estate tax purposes if the terminating event has not occurred; the question there, as here, is whether that hypothetical valuation should still govern in cases where a post-death event has resulted in actual payment of the claim in full.

tate" generally. Although a creditor may have a valid claim as of the date of the testator's death, his claim may disappear, or be reduced, in light of subsequent developments. The creditor, for example, may fail to present his claim timely under state law, causing it to become void. He may waive his claim, settle it with the executors for a lesser sum, or obtain satisfaction from a party other than the estate. With near unanimity, the courts of appeals have held that the estate in such circumstances may not deduct the theoretical date-of-death value of the claim, but may deduct only the lesser amount, if any, that it actually pays to satisfy the claim in full. *E.g.*, *Commissioner* v. *State Street Trust Co.*, 128 F.2d 618, 621-622 (1st Cir. 1942) (where claim was subsequently reduced by compromise agreement, deduction limited to amount actually paid); *Estate of Hagmann* v. *Commissioner*, 60 T.C. 465, 466-469 (1973), aff'd per curiam, 492 F.2d 796 (5th Cir. 1974) (where claim became void because not timely presented, deduction denied in full); *Jacobs* v. *Commissioner*, 34 F.2d 233, 235-236 (8th Cir.), cert. denied, 280 U.S. 603 (1929) (where claimant abandoned contractual claim for bequest under will, deduction denied in full); *Estate of Metcalf* v. *Commissioner*, 7 T.C. 153, 160-162 (1946), aff'd by order, 47-2 U.S. Tax Cas. (CCH) ¶ 10,566 (6th Cir. 1947) (where claims for taxes and interest were subsequently settled for lesser amounts, deduction limited to amounts actually paid). Contra, *Propstra* v. *United States*, 680 F.2d 1248, 1253-1256 (9th Cir. 1982) (approving deduction of data-of-death amount of claim, even though subsequently compromised for lesser sum); *Commissioner* v. *Strauss*, 77 F.2d 401, 405 (1935), opinion withdrawn, 81

F.2d 1016 (7th Cir. 1936) (approving deduction of claim allowable under state law, but never presented to probate court and never paid).[4]

2. The courts below erred in holding, contrary to the majority view, that post-death events are irrelevant as a matter of law in computing deductions for "claims against the estate." That holding is at odds with the structure and purpose both of Section 2053 and of the Treasury Regulations. And to hold that a payment of

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[4] The Tax Court attempted to distinguish some of these cases (App., *infra*, 16a, 19a-22a) on the theory that they involved "potential, unmatured, contingent, or contested claim[s]," and that post-death events were considered in determining the claims' enforceability, as opposed to their valuation. This distinction is illusory. In each of the cited cases, the claim in question was neither contested nor hypothetical, but was valid and enforceable at the time of the testator's death; the fact that a creditor subsequently compromises, waives, or fails to present his claim does not make it "contingent" retroactively. See, *e.g.*, *Estate of Hagmann*, 60 T.C. at 466, 468. Where claims for future payments are concerned, moreover, the difference between determining the value of an enforceable claim, and determining the enforceability of a contingent claim, is often hard to see. Almost any claim could be styled "contingent," or not, depending on whether the post-death event is labeled a "condition precedent" or a "condition subsequent" to liability. (In the present case, for example, James's claim for support could be viewed as an "enforceable claim" to alimony for life, or as a "contingent claim" to an indeterminate number of monthly alimony payments, each conditioned on his continued survival. Under either view, James could have compromised, waived, or failed to present his claim, no less than the creditors in the cases the Tax Court sought to distinguish.) The language of Section 2053 provides no basis for treating "claims against the estate" differently depending on whether their valuation or their enforceability is at issue. And tax policy does not favor an interpretation that causes the outcome to turn on such metaphysical distinctions.

$35,000 entitles one to a deduction of $596,000 works no small affront to common sense.

a. Section 2053(a) provides that, in determining the taxable estate subject to estate tax, the gross estate shall be reduced by amounts paid for "funeral expenses," "administration expenses," "claims against the estate," and certain mortgages, to the extent that payment of these items is "allowable by the laws of the jurisdiction * * * under which the estate is being administered." In permitting a deduction for these items, Section 2053(a) is designed to limit the incidence of the estate tax to " 'what of value passes from the dead to the living.' " *Estate of Hagmann*, 60 T.C. at 467 (quoting *Jacobs* v. *Commissioner*, 34 B.T.A. 594, 597 (1936)). Stated conversely, the Section aims to exclude from tax amounts that are diverted from the estate's beneficiaries to satisfy specified obligations—be they burial costs, executor's commissions, legal fees, or claims against the estate—that are traceable to the decedent or that arise by virtue of his death. See, *e.g.*, *Estate of Shively*, 276 F.2d at 375; *Estate of Hagmann*, 60 T.C. at 467-468.

The structure and purpose of Section 2053 show that post-death events—specifically, events affecting payment or nonpayment—must be considered in determining the deductibility of these items. Events occurring after the testator's death are obviously relevant (generally they are the only events that are relevant) in determining the estate's funeral and administration costs, and the statute's language suggests no basis for treating "claims against the estate" differently.[5] Sec-

[5] Indeed, this Court, construing the predecessor of Section 2053(a), has held that "[t]he interpretation of 'administration

tion 2053 expressly requires actual payment as a precondition to deduction of certain items.[6] And it would be contrary to the statute's purpose to permit a deduction for items that are not actually paid, since an item not paid does not reduce "what of value passes from the dead to the living" (*Estate of Hagmann* v. *Commissioner*, *supra*), and thus offers no justification for reducing the estate tax.

The regulations interpreting Section 2053 confirm this construction of the statute. They define "claims against the estate" as "personal obligations of the decedent existing at the time of his death, whether or not then matured," and permit claims to be deducted only if they are "enforceable against the * * * estate." Treas. Reg. § 20.2053-4. In referring to the uncertain maturity and enforceability of claims at the time of death, the regulations necessarily contemplate reference to events occurring thereafter. The regulations explicitly require actual payment of funeral expenses, executor's fees, and other items specified in Section 2053(a).[7] If the ex-

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expenses' under § 812(b)(2) [of the 1939 Code] involves substantially the same considerations that determine the interpretation of 'claims against the estate' under § 812(b)(3)." *United States* v. *Stapf*, 375 U.S. 118, 134 (1963).

[6] See I.R.C. § 2053(b) (permitting deduction for expenses incurred in administering property not subject to claims if "such amounts are paid" before the statute of limitations expires); I.R.C. § 2053(d)(1)(B) (permitting deduction for death taxes "imposed by and actually paid to" foreign countries).

[7] See, *e.g.*, Treas. Reg. § 20.2053-2(a) (allowing deduction of such amounts for funeral expenses as "are actually expended"); Treas. Reg. § 20.2053-3(a) (allowing deduction for such administration expenses "as are actually and necessarily, incurred"); Treas. Reg. § 20.2053-3(b)(1) and (c)(1) (allowing deduction for executor's commissions and attorney's fees "in such an amount

act amount of an expenditure is not known when the return is filed, the regulations, on certain conditions, permit the deduction of estimated amounts, but only if the item is "ascertainable with reasonable certainty, and will be paid." Treas. Reg. § 20.2053-1(b)(3). Estimated deductions are "subject to modification as the facts may later require." Treas. Reg. § 20.2053-3(b)(1) (executor's commissions); Treas. Reg. § 20.2053-3(c)(1) (attorney's fees). Such modifications may be effected either during the audit process or in subsequent litigation. See Treas. Reg. §§ 20.2053-1(b)(3), 20.2053-3(b)(1), (c)(1) and (c)(2).

b. The vast majority of courts that have addressed the question have interpreted these Code and regulatory provisions, correctly, to require that post-death events be considered in determining the deductibility of claims against the estate, just as they are considered in determining the deductibility of funeral expenses, legal fees, executor's commissions, taxes, and other items specified in Section 2053(a). The results in these cases do not turn on any distinctive characteristics of the particular claims in question. See *Estate of Chesterton*, 551 F.2d at 282 (reviewing cases). Rather, their common thread is the principle that "[t]he claims which Congress intended to be deducted were actual claims, not theoretical ones" (*Jacobs*, 34 F.2d at 235), and that de-

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as has actually been paid or * * * at the time of filing the estate tax return may reasonably be expected to be paid"); Treas. Reg. § 20.2053-6(d) (allowing deduction for certain accrued gift taxes "to the extent that the obligation is enforced against the decedent's estate"); Treas. Reg. § 20.2053-10(a) (allowing deduction for death taxes "actually paid to any foreign country").

duction of "merely technical claims which disappear in the light of subsequent circumstances should not be allowed" (*Estate of Hagmann*, 60 T.C. at 469). This principle follows directly from Section 2053's purpose—to exempt from tax that portion of the decedent's estate that does not pass to his beneficiaries. As the Second Circuit put it in *Estate of Shively* (276 F.2d at 375), this purpose obviously—

> would not be served if a deduction were permitted for claims * * * which, though having vitality as of date of death, could never be enforced as of the date the estate tax return is filed. The property which might have been subject to such a claim were it enforceable is now certain to pass [to the decendent's beneficiaries]. To permit an estate such a deduction under these circumstances would be to prefer fiction to reality and would defeat the clear purpose of Section [2053].

c. In rejecting the majority view as to the relevancy of post-death events, the courts below (App., *infra*, 3a, 5a-6a, 17a-19a) relied primarily on this Court's decision in *Ithaca Trust Co.* v. *United States*, 279 U.S. 151 (1929). That case involved the construction of the predecessor of Section 2055, which governs the deduction for charitable bequests. The decedent's will left a life estate to his wife, remainder to charity. The wife died shortly after her husband did, so that her life estate turned out to be much smaller—and the charitable remainder concomitantly larger—than the actuarial expectation. 279 U.S. at 154. The Court nevertheless held that the estate's charitable deduction had to be computed by subtracting the actuarial value of the wife's life estate, computed at the time of her husband's death, rather than by subtracting the smaller amount

actually paid to her. Justice Holmes, writing for a unanimous Court, acknowledged that, on "first impression it is absurd to resort to statistical probabilities when you know the fact," but held this impression "due to inaccurate thinking," since "[t]he estate so far as may be is settled as of the date of the testator's death." 279 U.S. at 155.

Ithaca Trust has no application here because it involved, not the deduction for "claims against the estate" under Section 2053(a)(3), but the deduction for charitable bequests under Section 2055. Aside from the Ninth Circuit, every court of appeals that has considered the relevance of *Ithaca Trust* in the Section 2053(a) context has distinguished it on this ground. *E.g.*, *Estate of Chesterton*, 551 F.2d at 279-282; *Estate of Hagmann* v. *Commissioner*, 60 T.C. 465, 466-467 (1973), aff'd per curiam, 492 F.2d 796 (5th Cir. 1974); *Jacobs*, 34 F.2d at 235-236. Compare *Estate of Shively*, 276 F.2d at 374, with *id.* at 375-376 (Moore, J., dissenting).[8] The operation of Section 2053(a) precludes a generalized application of *Ithaca Trust*, since the bulk of the expenses it makes deductible—funeral expenses, executor's commissions, attorney's fees and other expenses of administering the estate—plainly require consideration of post-death events. And the Tax Court below itself recognized that *Ithaca Trust* can not apply generally in determing the deductibility of "claims against the estate," since it acknowledged that post-

[8] The Seventh Circuit, the only other court of appeals that has held post-death events irrelevant in computing the deduction for claims against the estate, based its holding on its interpretation of Section 2053's predecessor, and did not mention *Ithaca Trust*. See *Commissioner* v. *Strauss*, 77 F.2d at 405.

death events must necessarily be considered in determining the deductibility of contingent or contested claims. See App., *infra*, 22a.

In thus distinguishing *Ithaca Trust*, the courts have properly given effect, not only to the necessary differences in the operation of Sections 2053 and 2055, but also to Congress's differing purposes in enacting the two sections. In providing a deduction for charitable bequests, Congress intended to encourage philanthropic behavior by testators. "Thus, before a charitable deduction will be permitted, it must be said that, looking at the face of the will and the circumstances existing at the time of the testator's death, the possibilities that the charity will not take are so remote as to be negligible." *Underwood* v. *United States*, 407 F.2d 608, 610 (6th Cir. 1969). Accord, *Commissioner* v. *Estate of Sternberger*, 348 U.S. 187, 190-200 (1955); *Henslee* v. *Union Planters National Bank & Trust Co.*, 335 U.S. 595, 598-600 (1949); *Humes* v. *United States*, 276 U.S. 487, 493-494 (1928); Treas. Reg. § 20.2055-2(b). Because Congress's purpose was to influence testator behavior, the fact that a charity might take property because of fortuitous post-death events would not warrant a "windfall" deduction for the estate. See *Underwood*, 407 F.2d at 610; *Bach* v. *McGinnes*, 333 F.2d 979, 984 (3d Cir. 1964). It is thus proper, in computing the deduction for charitable bequests under Section 2055, to focus exclusively on the terms of the will and the circumstances existing at the time of death, as this Court did in *Ithaca Trust*.

Completely different considerations pertain in computing deductions under Section 2053. Expenditures to discharge tax obligations, mortgages, attorney's fees,

funeral expenses, and claims against the estate have nothing to do with the intent of the decedent. Nor, for the most part, can such expenditures be computed accurately until they are incurred (often after the decedent's death) and allowed (by the probate court during administration of the estate). Section 2053, in short, *inherently* involves consideration of events occuring after the testator's death. As the Eighth Circuit wrote in 1929, shortly after *Ithaca Trust* was decided, "[i]t was * * * claims presented and allowed or otherwise determined as valid against the estate and actually paid or to be paid that Congress had in mind, when it provided for the deduction * * * of 'claims against the estate' in determining the value of the net estate for taxing purposes." *Jacobs*, 34 F.2d at 235.

3. The question presented in this case has considerable administrative importance. The IRS advises that 43 similar cases, involving more than $6 million in estate tax, are now pending administratively or in the courts. The question arises in virtually every estate tax audit, since almost every estate has claims against it, the validity and amount of which may be affected by settlement, compromise, waiver, untimely presentation, disallowance, or other post-death events. Orderly and even-handed administration of the estate tax requires that the IRS be permitted to rely on objective evidence, obtained during the course of probate proceedings, in determining the deductibility of putative "claims against the estate." The decision below seriously impairs its ability to do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-7659
82-7716
Tax #3399-80

ESTATE OF ADA E. VAN HORN DECEASED,
ROBERT L. FARMER AND RICHARD R. COLE,
EXECUTORS,
PETITIONERS-APPELLEES CROSS-APPELLANTS

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT-APPELLANT CROSS-APPELLEE

On Appeal From the United States Tax Court
Argued and Submitted October 4, 1983
Filed: Nov. 22, 1983

OPINION

Before: FARRIS and REINHARDT, Circuit Judges, and WEIGEL* District Judge

REINHARDT, Circuit Judge:

This case concerns the proper method of valuing certain assets and liabilities for estate tax purposes. The

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*Honorable Stanley Alexander Weigel, United States District Judge, Northern District of California, sitting by designation.

tax court determined that under I.R.C. § 2053(a)(3) (1976) the estate is entitled to a deduction for the full date of death actuarial value of a life time spousal support obligation even when the spouse of the decedent dies prior to the filing of the estate tax return. The government appeals. The tax court also determined that the relevant block of shares to be considered for a blockage discount was that held by the estate at the alternate valuation date, rather than at the date of decedent's death, and that a blockage discount on those shares was not warranted. The plaintiff cross appeals from these determinations. We affirm the tax court in all respects.

I. BACKGROUND

The facts are uncontroverted. Ada E. Van Horne (decedent) died September 4, 1976. The federal estate tax return was timely filed on June 1, 1977. The executors elected to value the gross estate as of the alternate valuation date, March 4, 1977, rather than as of the date of death.

At the time of her death, the decedent was obligated, pursuant to an interlocutory judgment of dissolution of marriage, to pay $5,000 per month for spousal support to her surviving ex-husband, James Van Horne, for the remainder of his life. The judgment provided that the award could not be modified, notwithstanding either his remarriage or her death. In the event of the latter, the judgment provided that all payments thereafter falling due would become payable by the estate. The ex-husband filed a creditor's claim against the estate on October 29, 1976. The executors filed a petition for court approval of this claim on November 29, 1976, and it was approved on December 27, 1976.

The ex-husband died on April 20, 1977, having received only $35,000 from the estate in support pay-

ments. At the time of decedent's death, the ex-husband was aware that he had a liver ailment but had no reason to suspect that he was terminally ill with cancer. His fatal condition was not diagnosed until March of 1977.

The estate claims a deduction of $596,386.58 for the value of the ex-husband's claim. This amount was calculated by reference to the actuarial tables included in Treas. Reg. § 20.2031-10 (1983). The parties have stipulated that the amount computed is correct, if actuarial valuation is proper. The government contends that actuarial valuation is not proper here because the claim was actually extinguished after payment of only $35,000.

At the time of decedent's death she owned 56,454 shares of Wm. Wrigley Jr. Co. common stock (Wrigley stock). The executors decided to liquidate 42,416 shares to pay various expenses and taxes owed by the estate. In February 1977, these shares were sold in three blocks. Thus, on March 4, 1977, the alternate valuation date, the estate held only 14,038 shares of Wrigley stock. The estate contends on appeal that the entire block of Wrigley stock should be valued on the basis of a blockage discount.

I. VALUATION OF SPOUSAL SUPPORT OBLIGATION

The general principle that a claim against a decedent's estate is to be valued at the time of the decedent's death, and that events subsequent to death do not alter this valuation, was first announced by the Supreme Court in *Ithaca Trust Co.* v. *United States*, 279 U.S. 151 (1929). We recently reaffirmed this principle in *Propstra* v. *United States*, 680 F.2d 1248 (9th Cir. 1982). In *Propstra*, the petitioner's estate included two

parcels of real estate which were encumbered by liens for past dues and penalties owing to a local water users' association. The Government contested petitioner's claim that the liens were to be valued at the time of decedent's death. Because the amount of the liens was reduced by the association prior to the time the tax return was filed, the Government argued that their actual value rather than their value as of the date of death, should be deducted for estate tax purposes. We held that because the claims were certain and enforceable, we would not consider post-death events. Rather, "as a matter of law, when claims are for sums certain, and are legally enforceable as of the date of death, post-death events are not relevant in computing the permissible deduction." *Id.* at 1254.

The government argues both that *Propstra* was wrongly decided and that it is distinguishable on the ground that petitioner's spousal support obligation was not a "sum certain" and is therefore outside the rationale of *Propstra*. It contends that "[h]ere the spousal support obligation amounted in effect to a series of monthly claims each of which was contingent upon James' survival to a particular date."

In deciding *Propstra*, we carefully considered and rejected many of the arguments which the Government sets forth here. We said that Congress clearly intended that post-death events be disregarded when valuing legally recognized and enforceable claims against an estate.[1] We see no reason to reconsider *Propstra* or to

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[1] In *Propstra*, we reviewed the conflicting authorities and commentators who have addressed this issue. After careful consideration we found those authorities holding post-death events

distinguish spousal support obligations from other allowable claims.[2]

The fact that it is necessary to refer to an actuarial table in order to value a support obligation does not justify our reaching a different result here than we did in *Propstra*. A claim that is actuarily valued is not uncertain for estate tax purposes. We have recently approved the use of actuarial tables to value assets for purposes of estate tax deduction in *Bank of California* v. *U.S.*, 672 F. 2nd 758 (9th Cir. 1982). After reexamining this method of valuation we concluded that "actuarial tables provide a needed degree of certainty and administrative convenience in ascertaining property values." *Id.* at 760.

Moreover, the charitable trust at issue in *Ithaca Trust Co.*, also required actuarial valuation. Justice Holmes, writing for the Court, specifically considered whether post-death events are relevant when lifetime interests are at issue, and concluded that they are not:

> "The first impression is that it is absurd to resort to statistical probabilities when you know the fact. But this is due to inaccurate thinking. The estate so far as may be is settled as of the date of the tes-

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irrelevant to the computation of certain and enforceable claims to be persuasive. *Id.* at 1254 n.10.

[2] The government seeks to distinguish charitable deductions which are intended "to encourage testators to make bequests to charity" from spousal support obligations, claiming that, the section of the Code (§ 2053) permitting spousal support obligations to be deducted "necessarily contemplates the consideration of post-death events." While we do not doubt that Congress' purpose in enacting each deduction is unique, the government cites no authority demonstrating a legislative desire to effect differing post-death treatment in valuing these deductions.

> tator's death. . . . Tempting as it is to correct uncertain probabilities by the now certain fact, we are of opinion that it cannot be done, but that the value of the [wife's] life interest must be estimated by the mortality tables."

Id. at 155.

We hold that legally enforceable claims valued by reference to an actuarial table meet the test of certainty for estate tax purposes. Because decedent's spousal support obligation meets that test, it is subject to the *Propstra* rule. We affirm the tax court's determination that the date of decedent's death was the proper time for valuation of the claim.

II. THE BLOCKAGE DISCOUNT OF SHARES

We affirm the tax court's determination that only those shares remaining in the estate on March 4, 1977, the alternate valuation date, may be considered for blockage discount. I.R.C. § 2032 (1976) states unambiguously that property disposed of prior to the alternate valuation date shall be valued at market price.[3]

We also affirm the tax court's finding that petitioner has failed to show that the market price of Wrigley shares on March 4, 1977 did not accurately reflect the fair market value of the block of stock held by the estate on that date. It is petitioner's burden to establish that the block of stock at issue is so large in relation to the market that the market price is misleading. Treas.

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[3] I.R.C. § 2032(a)(1) provides in relevant part that when alternate valuation is elected, "[i]n the case of property distributed, sold, exchanged, or otherwise disposed of, within 6 months after decedent's death such property shall be valued as of the date of distribution, sale, exchange, or other disposition."

Reg. § 20.2031-2(e) (1983). We note that the remaining 14,038 shares represented only 0.36 percent of Wrigley stock outstanding on that date.

We have no disagreement with the tax court's conclusion that the remaining shares could have been disposed of in an orderly manner at no less than the market price. Petitioner argues that the fact that 42,416 shares liquidated prior to March 4 were sold at discounted prices serves as evidence that the residual block of 14,038 shares could not have been disposed of at the market price at the alternate valuation date. However, petitioner did not refute the evidence adduced at trial that the market had been in a state of decline prior to the alternate valuation date but was in a state of recovery by that time. Because the market in Wrigley stock was rising, the estate would not have been required to accept less than the market price in order to sell the remaining shares. We may reverse only if the tax court's findings are clearly erroneous, *Collins* v. *Thompson*, 679 F.2d 168,170 (9th Cir. 1982). Clearly, they were not.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Tax #3399-80
No. 82-7659 &
82-7716

CENTRAL CALIFORNIA

ESTATE OF ADA E. VAN HORNE, DECEASED,
ROBERT L. FARMER AND RICHARD R. COLE,
EXECUTORS, PETITIONERS-APPELLEES
CROSS-APPELLANTS,

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT-
APPELLANT CROSS-APPELLEE,

JUDGMENT

Upon Petition to Review a Decision of The Tax Court of the United States,

This Cause came on to be heard on the Transcript of the Record from The Tax Court of the United States, on October 4, 1983 and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Decision of the said Tax Court of the United States in this Cause be, and hereby is AFFIRMED.

Filed and entered November 22, 1983

APPENDIX C

UNITED STATES TAX COURT

78 T.C. No. 48

DOCKET NO. 3399-80

ESTATE OF ADA E. VAN HORNE, DECEASED, ROBERT L. FARMER AND RICHARD R. COLE, EXECUTORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Filed: April 26, 1982

OPINION

RAUM, *Judge:* The Commissioner determined an estate tax deficiency of $448,828.66 in respect of the Estate of Ada E. Van Horne. Following several concessions by the estate (sometimes referred to as petitioner), two issues remain: (1) whether, in valuing an undisputed claim of a life interest against the estate for purposes of the deduction under section 2053(a)(3), I.R.C. 1954, the Commissioner properly disregarded the actuarial tables in order to give effect to the claimant's unexpected early death subsequent to the date of the decedent's death, and (2) whether certain stock in the gross estate should be discounted for "blockage". The case has been submitted on the basis of a stipulation of facts.

Ada E. Van Horne died September 4, 1976, while domiciled in California. The estate tax return was time-

ly filed, on June 1, 1977, with the Internal Revenue Service in Los Angeles, California. The executors are Robert L. Farmer, of San Marino, California, and Richard R. Cole, of Albuquerque, New Mexico. They elected to value the gross estate on the alternate valuation date, March 4, 1977, rather than the date of death.

At the time of her death, the decedent was obligated, pursuant to an Interlocutory Judgment of Dissolution of Marriage, to pay to her surviving ex-husband, James Van Horne, $5,000 per month for spousal support for the remainder of his life. This award of support could not be modified, and the payments were to continue regardless of either his remarriage or her death. The Interlocutory Judgment provided further that, in the event of her death, all payments thereafter falling due would become payable by her estate.

James filed a creditor's claim on October 29, 1976, within the statutory period prescribed therefore. The executors filed a petition on November 29, 1976, for court approval of the claim, and it was approved by order dated December 27, 1976.

At the time of his former wife's death, James was aware that he had a liver ailment as a result of excessive drinking, but he had no reason to believe that he had a terminal disease. In fact, he was examined by his regular physician a few weeks after his former wife's death, and the physician failed to note any evidence of a life-threatening condition. In March of 1977, however, James' health began to decline and on March 27, 1977, he entered a hospital. At this point, both the physician and James were aware that James had cancer, though apparently this act was not then disclosed to the execu-

tors. James died on April 20, 197[illegible], having received from the estate only $35,000 in respect of his claim for spousal support.

On the estate tax return, the executors claimed a deduction of $596,386.58 for the debt to James. This amount was computed using the actuarial tables found in section 20.2031-10, Estate Tax Regs. The parties have stipulated that the amount computed is correct if use of the actuarial tables is the proper method of valuing the debt. The Government contends, however, that actuarial valuation should be disregarded here because the obligation was in fact extinguished after the payment of only $35,000.

At the time of her death, the decedent, a granddaughter of William Wrigley, Jr., owned 56,454 shares of Wm. Wrigley Jr. Co. common stock (Wrigley stock), which was listed on the New York Stock Exchange. The closing price of the stock on September 3, 1976, the day before her death, was $82.25 per share, but on March 4, 1977, the alternate valuation date, the mean market price of the stock was $73.9375 per share. On both dates, the total number of outstanding shares of Wrigley stock was approximately 3,940,000.

The executors determined that it would be necessary to liquidate a large portion of the estate's Wrigley stock in order to pay the various expenses and taxes due from the estate. To this end, advice was obtained from a representative of Morgan, Stanley & Co., Inc., a member firm of the New York Stock Exchange specializing in the trading of Wrigley stock. The advice given to the executors on or about December 17, 1976, and again to counsel for the executors on February 18, 1977, was that approximately 40,000 shares could feasi-

bly be sold in one of the two following ways: (a) a block sale, with Morgan, Stanley as agent, at a discount from market price at time of sale of between five percent and eight percent; or (b) a nonregistered secondary offering which would depress the market price by an estimated three dollars per share.

On February 16, 1977, three Wrigley family members and a family trust offered to purchase certain amounts of stock, totaling 18,916 shares, at a discount of $2 per share from the then market price of $76.25 per share. Upon petition of the executors, court approval of the proposed sale was obtained on February 18, 1977. Pursuant to the court decree, the shares were sold for $74.25 each.

On February 24, 1977, the court granted the executors the authority to sell two additional blocks of the estate's Wrigley stock at a discount of $2 per share from the market price. Philip K. Wrigley purchased 5,000 shares at $71.75 per share, and as to the second block, which consisted of 18,500 shares, an order to sell was placed with Morgan, Stanley. On February 25, 1977, Morgan, Stanley sold the shares in private placements in separate blocks of 16,000 and 2,500 shares, all at the discounted price of $71 per share.

As a result of these dispositions, the estate held only 14,038 shares of Wrigley stock on March 4, 1977, the alternate valuation date. As stated above, the mean market price of the stock on that date was $73.9375 per share. Set forth below is the range of prices and trading volumes for the approximately four month period surrounding the alternate valuation date:

Week Ending	Market Price Range High	Low	Close	Volume (000)
Jan. 7, 1977	73.500	72.000	72.375	3.5
Jan. 14, 1977	73.000	72.250	73.000	3.7
Jan. 21, 1977	73.750	71.750	73.750	3.0
Jan. 28, 1977	77.250	74.250	77.250	7.1
Feb. 4, 1977	80.000	76.500	80.000	5.5
Feb. 11, 1977	80.000	78.500	78.500	4.8
Feb. 18, 1977	78.000	73.750	73.750	9.0
Feb. 25, 1977	73.875	71.000	71.000	21.8[1]
Mar. 4, 1977	74.000	70.375	74.000	7.9
Mar. 11, 1977	80.500	74.250	79.500	42.8
Mar. 18, 1977	81.000	75.250	80.000	30.1
Mar. 25, 1977	80.875	79.250	79.750	18.7
Apr. 1, 1977	81.500	80.000	81.375	13.8
Apr. 8, 1977	81.875	80.000	81.375	8.1
Apr. 15, 1977	85.000	80.250	85.000	35.4
Apr. 22, 1977	86.000	84.250	85.000	20.4
Apr. 29, 1977	84.000	80.250	81.750	11.4

On the estate tax return, the 14,038 shares held by petitioner on March 4, 1977, were valued at $71.9375, to reflect a $2 per share discount for "blockage". The Government contends that such a discount is inappropriate here, and seeks to value the shares at the March 4, 1977, mean market price.

Section 2053 deduction. Section 2053(a), I.R.C. 1954,[2] provides for a deduction from the gross estate

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[1] This figure includes the 18,500 shares sold by the estate through Morgan, Stanley.

[2] SEC. 2053. EXPENSES, INDEBTEDNESS, AND TAXES.

(a) General Rule.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts—

* * *

(3) for claims against the estate, * * *

* * *

for, inter alia, "claims against the estate * * * as are allowable by the laws of the jurisdiction * * * under which the estate is being administered". According to the applicable Treasury regulation, "[o]nly claims enforceable against the decedent's estate may be deducted". Section 20.2053-4, Estate Tax Regs.

This case presents no issue as to whether the claim of the surviving ex-husband was either "allowable" or "enforceable"; it is clear that the claim was timely submitted and subsequently approved by the state court with jurisdiction over the estate. Instead, we are concerned here with valuation of the claim. The Government contends that a deduction of only $35,000 is permissible, because this was the amount actually paid by petitioner before the obligation was extinguished by James' death. Petitioner claims a deduction for the actuarial value of the debt as of the date of the wife's death ($596,386.58), arguing that events occurring subsequent to her death may not be taken into account to arrive at a different value.[3]

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as are allowable by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.

[3] Because the parties have stipulated as to the proper actuarial value of the debt, which they computed as of the date of death, we are not presented with the issue of whether a claim against the estate should be valued as of the alternate valuation date, rather than the date of death, when the election is made under sec. 2032, I.R.C. 1954, to value the gross estate on the alternate date. We note in passing the apparent absence of illumination on this point in the regulations and the case law. However, sec. 2032 is concerned with the valuation of the *gross* estate, and does not involve *deductions* except for a few special situations which plainly do not include deductions of the kind involved herein.

The petitioner finds support for its position in *Estate of Lester* v. *Commissioner*, 57 T.C. 503, 507 (1972), which, like the present case, involved an obligation to make periodic payments pursuant to a divorce decree. The decedent in *Estate of Lester* was ordered to pay $1,000 per month to his former wife until her death or the expiration of 130 months, whichever event should first occur. The divorce decree required that the decedent's estate continue the payments, which it did beginning with his death at a time when 111 installments remained unpaid. After making 10 payments, the estate substituted a commercial annuity for the remaining obligation, and sought to deduct, under one of its alternative contentions, the sum of the payments made and its cost for the annuity. The Government's position, contrary to the one taken here, was summarized as follows (57 T.C. at 506):

> The Commissioner contends that the amount of the estate's obligation to the decedent's ex-wife is the commuted value at the date of death of the installments which had not yet become due. He cites *Ithaca Trust Co.* v. *United States*, 279 U.S. 151 (1929), as authority. Thus we are referred to section 20.2031-7(a)(1) and (2) and in turn to section 20.2031-7(e), Estate Tax Regs., the latter of which gives instructions concerning the valuation of an interest, an annuity in this case, which "is dependent * * * upon a term certain concurrent with one * * *" life.

We sustained the Government, holding that the general principle of *Ithaca Trust Co.* v. *United States*, 279 U.S. 151, 155 (1929), discussed hereinafter—that so far as is possible valuation is determined as of the date of

death by the use of actuarial tables[4]—must apply, and we said (57 T.C. at 507):

> The use of actuarial tables such as those found in section 20.2031-7, Estate Tax Regs., to ascertain the value of such a claim, especially when it is periodic in nature, has been the administrative and judicial norm for many years. *Estate of Pompeo M. Maresi*, 6 T.C. 582, 586 (1946), affirmed sub nom. *Commissioner* v. *Maresi*, 156 F. 2d 929 (C.A. 2, 1946); *Estate of Francis Browne Grinnell*, 44 B.T.A. 1286, 1288 (1941), modified sub nom. *Commissioner* v. *State Street T. Co.*, 128 F. 2d 618 (C.A. 1, 1942); *Estate of Reginald L. Taylor*, 39 T.C. 371, 374 (1962), affirmed sub nom. *Gowetz* v. *Commissioner*, 320 F.2d 874 (C.A. 1, 1963); Rev. Rul. 67-304, 1967-2 C.B. 224.

The Government offers no explanation for its conflicting positions in *Estate of Lester* and the instant case; instead, it seeks to distinguish *Estate of Lester* factually and it contends that other cases, like *Estate of Thompson* v. *Commissioner*, 74 T.C. 858 (1980); *Estate of Courtney* v. *Commissioner*, 62 T.C. 317 (1974); and *Estate of Hagmann* v. *Commissioner*, 60 T.C. 465 (1973), affd. 492 F. 2d 796 (5th Cir. 1974), are all closer on point than *Estate of Lester*. We do not agree. The Government's argument is flawed, for it fails to distinguish between the *enforceability* of the claim, which was the issue presented in the foregoing cases, and the *valuation* of an enforceable claim, which is the issue common to *Estate of Lester* and the case at bar. Stated somewhat differently, the so-called claims in those cases were only potential, unmatured, contingent, or contested claims at the date of death, and it became necessary to consider post-death events to determine

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[4] See p. 13, *infra*.

whether or to what extent such "claims" actually ripened into enforceable claims that could be deducted at all.

Before undertaking an analysis of these cases, it is important to begin with a close examination of the Supreme Court's opinion in *Ithaca Trust* v. *United States*, 279 U.S. 151 (1929), which was relied upon in *Estate of Lester* and which was distinguished or ignored in the cases urged upon us by the Government. In *Ithaca Trust*, the decedent bequeathed his residuary estate in trust to his wife for life[5] with remainder to charitable donees. In order to determine the amount of the charitable deduction it was necessary first to fix a value for the widow's life estate which would then be subtracted from the principal to arrive at the amount of the deductible charitable remainder. Cf. *Estate of Boeshore* v. *Commissioner*, 78 T.C. ____ (Mar. 31, 1982) (Slip Op. p. 16). The estate's claimed deduction was based on a valuation of the life estate computed actuarially as of the date of the testator's death. However, the widow in fact died within six months, long before the expiration of her life expectancy and even prior to the lapse of the one year fixed by the applicable Revenue Act of 1918 for filing the estate tax return. In holding that the computation must be based on the actuarial tables rather than on the precise known time of

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[5] He also authorized invasion of the principal for any sum "that may be necessary to suitably maintain her in as much comfort as she now enjoys". The Court held the power to invade was limited by a standard that was fixed in fact, and since the income was more than sufficient to maintain the widow as required, her life interest could be valued without taking that power into account. *Ithaca Trust Co.* v. *United States*, 279 U.S. 151, 154 (1929).

the widow's subsequent death, the Court stated (pp. 154-155):

> The second question is raised by the accident of the widow having died within the year granted by the statute, § 404, and regulations, for filing the return showing the deductions allowed by § 403, the value of the net estate and the tax paid or payable thereon. By § 403 (a)(3) the net estate taxed is ascertained by deducting, among other things, gifts to charity such as were made in this case. But as those gifts were subject to the life estate of the widow, of course their value was diminished by the postponement that would last while the widow lived. The question is whether the amount of the diminution, that is, the length of the postponement, is to be determined by the event as it turned out, of the widow's death within six months, or by mortality tables showing the probabilities as they stood on the day when the testator died. The first impression is that it is absurd to resort to statistical probabilities when you know the fact. But this is due to inaccurate thinking. The estate so far as may be is settled as of the date of the testator's death. * * * The tax is on the act of the testator not on the receipt of property by the legatees. * * * Therefore the value of the thing to be taxed must be estimated as of the time when the act is done. But the value of property at a given time depends upon the relative intensity of the social desire for it at that time, expressed in the money that it would bring in the market. * * * Like all values, as the word is used by the law, it depends largely on more or less certain prophecies of the future; and the value is no less real at that time if later the prophecy turns out false than when it comes out true. * * * Tempting as it is to correct uncertain probabilities by the now certain fact, we are of

> opinion that it cannot be done, but that the value of the wife's life interest must be estimated by the mortality tables. Our opinion is not changed by the necessary exceptions to the general rule specifically made by the Act.

The application of the foregoing principle to the facts of this case plainly requires that the value of James' life interest be computed actuarially as of the date of the decedent's death and not on the basis of his unexpected death seven months thereafter. Cf. *Simmons* v. *United States*, 667 F. 2d 832, 834 (9th Cir. 1982).

Unfortunately, much confusion and diversity of views have arisen since *Ithaca Trust* as a result of overly simplistic attempts to formulate a rule that post-death events can never be taken into account, and *Ithaca Trust* has been distinguished in certain situations. Thus, it became necessary to consider post-death events in cases involving deductions for debts of the decedent where the creditor had only a potential, unmatured, contingent, or contested claim that required further action or clarification before it became a fixed obligation of the estate that was payable under applicable state law. The *Thompson*, *Courtney*, and *Hagmann* cases referred to above are typical of such cases.

In *Estate of Thompson*, *supra*, post-death events were examined only to determine the enforceability of a claim against the estate. The petitioner in *Thompson* argued that an oral compromise in respect of a claim had been made during the Indiana statutory period for filing claims. Since "the validity of the claim, and, thus, its deductibility" must be determined under state law, it was necessary to consider the effectiveness of the

post-death event—the oral compromise—in establishing the claim under Indiana law. 74 T.C. at 861.

In *Estate of Courtney, supra,* both the decedent and his wife were liable on the note in question. Since the wife had made all of the post-death payments, no claim for payment had been presented to the estate. After noting the lack of evidence showing that the estate would ever make payment on the note, we said (62 T.C. at 323):

> What we have here is simply an *unmatured, potential* claim without an existing claimant. We think Congress did not have this situation in mind when it provided for the allowance of deductible claims under section 2053(a)(3) from the value of a decedent's gross estate. Accordingly, we hold that the petitioners are not entitled to a deduction for a debt owed by the estate *where the creditor does not enforce its claim against the estate.* (Emphasis supplied.)

Estate of Hagmann, supra, the final case in the foregoing triad, is also distinguishable in that it deals with enforceability rather than valuation. There, under applicable Florida law, a debt became void if no claim were filed against a decedent's estate within six months of publication of notice to creditors. Accordingly, since no claim was timely filed in *Hagmann,* the potential obligation never became enforceable, and it was held to be nondeductible. We were careful to point out in distinguishing *Ithaca Trust* that post-death evidence may appropriately be considered "when it relate[s] to the

enforceability of" the claimed deduction.[6] 60 T.C. at 467.

To be sure, all of the cases in this field dealing with post-death evidence are not easily reconciled with one another, and at times it is like picking one's way through a minefield in seeking to find a completely consistent course of decision in this area. However, subsequent cases which have relied upon *Estate of Hagmann* have generally done so for the proposition that events occurring after death may be considered when they shed light on the *enforceability* of the claim. See, e.g., *Estate of Greenberg* v. *Commissioner*, 76 T.C. 680, 684 (1981); *Estate of Colley* v. *Commissioner*, 40 T.C.M. 81, 96, 49 P-H Memo. T.C. par 80,107 (1980); *Estate of Silvester* v. *Commissioner*, 36 T.C.M. 1815, 1820, 46 P-H Memo. T.C. par. 77,439 (1977); *Estate of Gosch* v. *Commissioner*, 35 T.C.M. 353, 354, 45 P-H

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[6] By requiring that the claim be enforceable, the Treasury regulation (section 20.2053-4, Estate Tax Regs.) imposes the burden upon the estate of showing that all events necessary for a potential claim to become an existing and effective claim have occurred. It was in determining whether or not such a showing had been made that we looked, in *Estate of Hagmann*, to events occurring subsequent to death, for it is only after death that a claim against the decedent can become a binding obligation of the estate. If, as was the case in *Estate of Hagmann*, a prerequisite for maturation of a potential claim is never fulfilled, then at no time is the estate obligated to satisfy the claim. On the other hand, when all events have occurred such that the estate is liable for the debt under state law, then all of the requirements for deductibility have been met. This eliminates the need to broaden the scope of observation to encompass events subsequent to death, and the *Ithaca Trust* principle of valuation as of the date of death must apply.

Memo. T.C. par. 76,082 (1976)[7] but see *Estate of Scofield* v. *Commissioner*, 41 T.C.M. 227, 233, 49 P-H Memo. T.C. par. 80,470 (1980).

While there may well be a valid basis for distinguishing *Ithaca Trust* in cases involving potential, unmatured, contingent, or contested claims, we can find no tenable distinction between this case and *Ithaca Trust*. Both involve the *valuation* of a life estate as of the date of death of a decedent. To be sure, the life estate in *Ithaca Trust* was valued for the purpose of determining the amount of deduction allocable to the remainder, while the life estate here is being valued for the purpose of determining the amount of deduction attributable to the life estate itself. The problem presented involves identical considerations, and it would require a quixotic reading of the opinion in *Ithaca Trust* to conclude that it is not applicable here. It is one thing to distinguish *Ithaca Trust* in cases involving enforceability of a claimed debt, but to distinguish it here would be to distinguish it to the point of extinction. It is not the function of this Court, a lower court, to overrule the Supreme Court. Cf. *United States* v. *Mason*, 412 U.S. 391, 396 (1973). If a different result is thought to be more desirable, the proper course is to await reversal by the Supreme Court itself or a legislative modification of the controlling statute.

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[7] We employed somewhat similar reasoning in distinguishing *Ithaca Trust* in *Estate of Mary Redding Shedd* v. *Commissioner*, 37 T.C. 394 (1961), affd. 320 F.2d 638 (9th Cir. 1963), where the claim pending at the decedent's death was subject to a contingency the resolution of which was deemed critical in determining the deduction from the gross estate.

A troublesome case in this field is *Commissioner* v. *Shively's Estate*, 276 F. 2d 372 (2d Cir. 1960), decided by a divided panel of the Second Circuit, reversing a Memorandum Opinion of this Court, 17 T.C.M. 965, 27 P-H Memo T.C. par 58,196 (1958). That case did involve a comparable, but not identical problem to that presented by the instant case. There, the obligation to make periodic payments to the surviving spouse was to continue for the life of that spouse or until remarriage. The surviving spouse in fact remarried less than one year after the decedent's death and prior to the filing of the estate tax return. In holding that the amount deductible must be limited to the payments actually made, the majority placed weight on the fact that under the applicable Connecticut law the surviving spouse's provable claim would have been limited to the payments due prior to remarriage. 276 F. 2d at 374. No such circumstance is present here, where James' claim to payments for the remainder of his life was approved by the California court, and there is no contention that the claim would be limited under local law by post-death events. The majority also relied heavily upon the fact that the remarriage occurred prior to the filing of the estate tax return. 276 F.2d at 375.[8] However, in

[8] See also *Estate of Chesterton* v. *United States*, 551 F.2d 278 (Ct. Cl., 1977), where the remarriage of the surviving spouse prior to the filing of the estate tax return was similarly stressed. In *Estate of Chesterton*, the court grounded its opinion to some extent on the *enforceability* line of cases typified by *Estate of Hagmann*. As we have already pointed out in great detail, these cases are distinguishable from the instant case and *Ithaca Trust*, which involve only *valuation* of a claim. Another possible distinction between *Estate of Chesterton* (as well as *Shively's Estate*) and *Ithaca Trust* is that the payments in the

the *Ithaca Trust* case, the Supreme Court made clear that occurrence of the death of the life beneficiary prior to the due date of the return was wholly irrelevant. 279 U.S. at 154. This was pointed out in the dissenting opinion of Judge Moore, 276 F. 2d at 376, and it is at least questionable whether the *Shively's Estate* majority opinion would be followed in this respect today by the Second Circuit. In any event, in view of the perceived status of Connecticut law, in contrast to California law involved herein, *Shively's Estate* is not controlling here. We note that *Estate of Lester*, upon which we rely here, was decided some 12 years after *Shively's Estate*.

We hold that James Van Horne's claim against petitioner must be valued actuarially as of the date of Ada Van Horne's death. This holding is in accord with the unanimous opinion of the Supreme Court in *Ithaca Trust*. It also follows our opinion in *Estate of Lester* and is compatible with the line of cases represented by *Estate of Hagmann*.[9]

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former cases were subject to termination by a wholly volitional act, namely, remarriage; no consideration appears to have been given to whether there existed reliable statistical tables dealing with the likelihood of remarriage in contrast to the generally accepted mortality tables, which are deemed actuarially sound and are relied upon in computing the value of a life estate. Cf. *Humes* v. *United States*, 276 U.S. 487, 493 (1928); *Commissioner* v. *Maresi*, 156 F.2d 929, 931 (2d Cir. 1940), affg. 6 T.C. 582 (1946).

[9] Given our determination that valuation of this claim is to be made as of the date of the former wife's death, we have no doubt that this is an appropriate case for use of the actuarial tables. Despite the fact that James Van Horne's death occurred only some seven months after her death, his death was not anticipated to be imminent in September of 1976 (in fact his fatal ailment was then undiagnosed) and thus the tables must be used

"Blockage" Discount. At Ada Van Horne's death, her estate contained 56,454 shares of Wrigley stock; at the alternate valuation date, March 4, 1977, only 14,038 shares remained. The dispute here concerns only the shares still in the estate at the alternate valuation date, for it is clear that the value of the shares sold is fixed as of the date of sale. Section 2032(a)(1). As a preliminary matter, petitioner contends that, for purposes of determining whether a blockage discount is appropriate for the retained shares, we should consider the relevant block to be all of the shares held at the date of death. Stated differently, petitioner takes the position that the interim sales of 42,416 shares should not diminish the original block of 56,454 shares, even though such sales establish the value of the shares sold. It is the Government's contention that the shares sold prior to the alternate valuation date cannot be considered in valuing the retained shares; in addition, the Government asserts that the value of the 14,038 shares held by the estate on March 4, 1977, was the mean market value without diminution for a blockage discount. We agree with the Government on both counts.

(a) A simple examination of section 2032(a), the applicable provisions of which follow, reveals the fatal weakness of petitioner's argument as to the relevant block for valuation:

> SEC. 2032. ALTERNATE VALUATION
>
> (a) General.—The value of the gross estate may be determined, if the executor so elects, by valuing

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to value the annuity. See *Miami Beach First Nat'l Bank* v. *United States*, 443 F. 2d 116, 120 (5th Cir. 1971); *Estate of Hoelzel* v. *Commissioner*, 28 T.C. 384, 389 (1957); Rev. Rul. 80-80, 1980-1 C.B. 194.

all the property included in the gross estate as follows:

(1) In the case of property distributed, sold, exchanged, or otherwise disposed of, within 6 months after the decedent's death such property shall be valued as of the date of distribution, sale, exchange, or other disposition.

(2) In the case of property not distributed, sold, exchanged, or otherwise disposed of, within 6 months after the decedent's death such property shall be valued as of the date 6 months after the decedent's death.

As indicated above, subsection (a)(1) provides the rule for valuation of 42,416 shares sold prior to March 4, 1977. Subsection (a)(2), covering "property not distributed, sold, exchanged, or otherwise disposed of, within 6 months after the decedent's death", by definition applies only to property remaining in the estate at the alternate valuation date. The rule of valuation expressed in subsection (a)(2), that "such property shall be valued as of the date 6 months after the decedent's death", can therefore apply only to the 14,038 shares still in the estate. We reject petitioner's reading of this statute, which would value the 14,038 shares as though there were 56,454 shares in the estate on March 4, 1977, and we hold that the relevant block of stock for determining the appropriateness of a discount here is 14,038 shares.[10]

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[10] The unsoundness of petitioner's position may be illustrated by the following example. Suppose that the estate had sold all of the 56,454 shares except 10 shares prior to the alternate valuation date. In accordance with petitioner's theory, the remaining 10 shares would be entitled to a blockage discount as of the alternate valuation date. We would thus have the bizzarre result of valuing the 56,444 shares sold at their actual sales

(b) The starting point for consideration of a blockage discount in valuing shares in the gross estate is section 20.2031-2(e), Estate Tax Regs., which provides, in part, as follows:

> (e) *Where selling prices or bid and asked prices do not reflect fair market value.* If it is established that the value of any bond or share of stock determined on the basis of selling or bid and asked prices as provided under paragraphs (b), (c), and (d) of this section does not reflect the fair market value thereof, then some reasonable modification of that basis or other relevant facts and elements of value are considered in determining the fair market value. Where sales at or near the date of death are few or of a sporadic nature, such sales alone may not indicate fair market value. In certain exceptional cases, the size of the block of stock to be valued in relation to the number of shares changing hands in sales may be relevant in determining whether selling prices reflect the fair market value of the block of stock to be valued. *If the executor can show that the block of stock to be valued is so large in relation to the actual sales on the existing market that it could not be liquidated in a reasonable time without depressing the market, the price at which the block could be sold as such outside the usual market, as through an underwriter, may be a more accurate indication of value than market quotations.* (Emphasis supplied.)

The analytical framework set out by this regulation is that, as a threshold requirement for consideration of evidence of the price at which shares could be sold outside the usual market, it must be shown that actual

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price and of valuing the remaining 10 shares on the basis of blockage.

sales on the market, at or near the date of death, are not representative of the value of the stock held because of the disproportion between the volume of market sales and the block of stock to be valued.

Between January 7, 1977, and March 4, 1977, the alternate valuation date, the average weekly trading volume of Wrigley stock (excluding the 18,500 shares sold through Morgan, Stanley) was 5,311.11 shares, and during this period the closing price of the stock rose $1.625. In the following eight weeks, the average trading volume was 22,587.5 shares, and the closing stock price reflected a further increase of $7.75 a share. In the face of this evidence, petitioner asks us to draw the conclusion that it could not dispose of 14,038 shares, "in a reasonable time without depressing the market". Section 20.2031-2(e), Estate Tax Regs. We fail to see any merit in such a conclusion, for it seems apparent that in just the four weeks following March 4, 1977, a period during which 105,400 shares were traded while the market value rose $7.375 per share, petitioner could have sold all of its remaining Wrigley stock, at least in stages, without any significant depressing effect on the market price, and certainly at an average price that would not have been less than the median March 4, 1977, market price of the stock.

Petitioner has failed to show that the market price of the stock on March 4, 1977, was an inaccurate reflection of the true value of the block of 14,038 shares held by it on that day. True, it has shown that the estate made private sales of 42,416 shares prior to that time at a $2 discount and that it had received advice from Morgan, Stanley prior to the alternate valuation date in respect of a sale of a block of 40,000 shares. But the record re-

veals that although the market was rather thin for the period preceding March 4, 1977, there was a substantial increase in volume accompanied by higher prices immediately thereafter. In valuing a block of stock we are not required to assume that the entire block was dumped on the market at one time on the valuation date. Rather, the inquiry must be directed to the effect upon the market based on the assumption that the block was being fed out into the market during a reasonable period of time. And in view of the evidence of a strong, rising market beginning with the week immediately following the alternate valuation date, the conclusion is compelling that the 14,038 shares could have been sold in smaller amounts over a comparatively brief period of at most several weeks without depressing the market below the market price for the stock on March 4, 1977. In the circumstances, we find no basis for rejecting the Commissioner's refusal to approve a blockage discount for the 14,038 shares. We hold that the Commissioner's determination of a value of $73.9375 per share must be sustained.

To reflect the foregoing, as well as to give effect to certain concessions made by petitioner,

Decision will be entered under Rule 155.

APPENDIX D

Internal Revenue Code of 1954, 26 U.S.C. 2053: Expenses, indebtedness, and taxes.

(a) *General Rule.*—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts—

(1) for funeral expenses,

(2) for administration expenses,

(3) for claims against the estate, and

(4) for unpaid mortgages on, or any indebtedness in respect of, property where the value of the decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate,

as are allowable by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.

* * * * *

(c) *Limitations.*—

(1) *Limitations applicable to subsections (a) and (b).*—

(A) *Consideration for claims.*—The deduction allowed by this section in the case of claims against the estate, unpaid mortgages, or any indebtedness shall, when founded on a promise or agreement, be limited to the extent that they were contracted bona fide and for an adequate and full consideration in money or money's worth; * * *

* * * * *

Treasury Regulations on Estate Tax (1954 Code), 26 C.F.R. 20.2053-4:

Deduction for claims against the estate; in general. The amounts that may be deducted as claims

against a decedent's estate are such only as represent personal obligations of the decedent existing at the time of his death, whether or not then matured, and interest thereon which had accrued at the time of death. Only interest accrued at the date of the decedent's death is allowable even though the executor elects the alternate valuation method under section 2032. Only claims enforceable against the decedent's estate may be deducted. Except as otherwise provided in § 20.2053-5 with respect to pledges or subscriptions, section 2053(c)(1)(A) provides that the allowance of a deduction for a claim founded upon a promise or agreement is limited to the extent that the liability was contracted bona fide and for an adequate and full consideration in money or money's worth. See § 20.2043-1. Liabilities imposed by law or arising out of torts are deductible.

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No. 83-1561

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

ESTATE OF ADA E. VAN HORNE, DECEASED, ROBERT L. FARMER AND RICHARD R. COLE, EXECUTORS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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April 18, 1984

QUESTION PRESENTED

Under the provisions of Section 2053(a)(3) of the Internal Revenue Code of 1954, a federal estate tax deduction is allowed "for claims against the estate". The question presented is whether that section requires that an allowable and enforceable claim for a lifetime annuity be valued as of the date of death solely by use of actuarial tables, or whether events occurring after the decedent's death may be considered in establishing a different value for that claim.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

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ESTATE OF ADA E. VAN HORNE, DECEASED,
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The facts material to consideration of the question presented have been fully and accurately set forth in the Statement of the Commissioner of Internal Revenue ("the Commissioner") contained in the petition (petition at 2, 3). The Statement also fairly summarizes the holdings of the

Tax Court and the Ninth Circuit on the question presented (petition at 3, 4, 5). Both lower courts determined that the principles established by this Court in *Ithaca Trust Co. v. United States*, 279 U.S. 151 (1929) were controlling and dispositive of the case at bar (App. at 3a, 5a, 6a; at 19a, 22a).[1]

REASONS FOR DENYING THE WRIT

I. FOR FEDERAL ESTATE TAX PURPOSES, THE LAW IS SETTLED THAT A VALID AND ENFORCEABLE CLAIM FOR A LIFETIME ANNUITY MUST BE VALUED AS OF THE DATE OF DEATH BY USE OF ACTUARIAL TABLES.

A. In 1929, this Court decided *Ithaca Trust Co. v. United States*, 279 U.S. 151 (1929). There, the testator gave his wife a life estate in the residue of his estate, together with a limited right to invade principal for her benefit. On her death, the estate remainder was to pass to charitable beneficiaries.[2] The wife, in fact, died within six months of the testator's death and prior to the due date of the estate's federal estate tax return.

In order to compute the federal estate tax charitable deduction, there was apparent agreement that the wife's life estate must first be valued. The life estate would then be subtracted from the residue of the estate to determine the value of the deductible charitable remainder.

The issue presented to this Court was the proper manner of valuing the wife's life estate. The testator's estate claimed an enlarged charitable deduction based upon the wife's death before the expiration of her life expectancy. The government

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[1] Citations to "App" are to the appendix to the petition and are the same in form as those in the petition. Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

[2] The Court held that the limited right to invade principal for the benefit of the wife did not make the charitable gifts so uncertain as to preclude any estate tax charitable deduction therefor. *Ithaca Trust Co. v. United States*, 279 U.S. 151, 154 (1929).

sought to limit the charitable deduction by claiming that the life estate had to be valued as of the testator's date of death without reference to facts known when the estate tax return was filed.

This Court, in holding that the wife's life estate had to be valued as of the testator's death by use of actuarial tables, stated:

> "The second question is raised by the accident of the widow having died within the year granted by the statute sec. 404, and regulations, for filing the return showing the deductions allowed by sec. 403, the value of the net estate and the tax paid or payable thereon. By sec. 403(a)(3) the net estate taxed is ascertained by deducting among other things gifts to charity such as were made in this case. But as those gifts were subject to the life estate of the widow of course their value was diminished by the postponement that would last while the widow lived. The question is whether the amount of the diminution, that is, the length of the postponement, is to be determined by the event as it turned out, of the widow's death within six months, or by mortality tables showing the probabilities as they stood on the day when the testator died. The first impression is that it is absurd to resort to statistical probabilities when you know the fact. But this is due to inaccurate thinking. The estate so far as may be is settled as of the date of the testator's death. *** The tax is on the act of the testator not on the receipt of property by the legatees. *** Therefore the value of the thing to be taxed must be estimated as of the time when the act is done. But the value of property at a given time depends upon the relative intensity of the social desire for it at that time, expressed in the money that it would bring in the market. *** Like all values, as the word is used by the law, it depends largely on more or less certain prophecies of the future, and the value is no less real at that time if later the prophecy turns out false than when it comes out true. *** Tempting as it is to correct uncertain probabilities by the now certain fact, we

are of opinion that it cannot be done, but that the value of the wife's life interest must be estimated by the mortality tables. Our opinion is not changed by the necessary exceptions to the general rule specifically made by the Act." 279 U.S. at 154-155.

In addition to determining the valuation issue presented for decision, *Ithaca Trust* enunciated the following principles which remain an integral part of the system of federal estate tax administration:

(i) The estate so far as may be is settled as of the date of the testator's death; and

(ii) Where death of the measuring life is the only factor affecting valuation, actuarial tables must be used to determine a sum certain date of death value.

These principles will be discussed throughout the remainder of this brief.

The applicability of *Ithaca Trust* to the valuations of "claims against the estate" has been considered in a number of lower court proceedings [e.g., *Propstra v. United States*, 680 F. 2d 1248 (9th Cir. 1982); *Commissioner v. Estate of Shively*, 276 F. 2d 372 (2d Cir. 1960)]. In only one case, *Estate of Lester v. Commissioner*, 57 T.C. 503 (1972), however, was any federal court presented with the issue of valuing a claim for a lifetime annuity where there was no variable other than the death of the annuitant.

The claim to be valued in *Estate of Lester*, like the claim in the case at bar, was an obligation to make periodic payments under a divorce decree. The decree provided for the payment of $1,000 per month to the former wife until the earlier of her death or the expiration of 130 months. If the husband died before completion of the required payments, his estate was to discharge the obligation. The husband died after making only 19 monthly payments. Thereafter, the decedent's estate made ten payments, then purchased a commercial annuity to cover the balance of the obligation. The executor claimed an

estate tax deduction of $111,000 ($1,000 x 111 months remaining at the husband's death) for the obligation under the divorce decree. During audit review of the estate tax return, the executor contended, as an alternative theory in support of an enlarged deduction, that the estate should be allowed a deduction equal to the sum of the monthly payments made by the estate and the purchase price of the annuity. The Commissioner, contrary to his position herein, urged that *Ithaca Trust* required that the claim be valued as of the date of death by use of actuarial tables. The Tax Court, in sustaining the Commissioner's contention, stated:

> "The *Ithaca Trust Co.* case indeed establishes the general principle that we must apply, if, as in the case before us, on the date of death the estate's obligation is one which will be satisfied in the future. The use of actuarial tables such as those found in section 20.2031-7, Estate Tax Regs., to ascertain the value of such a claim, especially when it is periodic in nature, has been the administrative and judicial norm for many years.***
>
> "We think there is no reason in this case to go beyond the principle of *Ithaca Trust Co. v. United States, supra* — that the value of the judgment in the divorce proceedings is to be determined as of the date of the husband's death by the use of the tables employed here by the Commissioner, which take into consideration the contingency of the wife's death prior to final payment of the installments to become due.
>
> "There is no need to go into the effect of events subsequent to the husband's death, i.e., how the estate finally freed itself of a continuing and admitted liability.
>
> "Here the validity of the claim is undisputed. The estate acknowledged it in the estate tax return and subsequently made payments thereon. The only question is how the claim should be valued for the purpose of determining the amount of the estate tax deduction. Under *Ithaca Trust Co.* this is to be done as of the time of death. Petitioner cites us

to no case or other authority which would show error in the Commissioner's determination and we have found none." 57 T.C. at 507.

The government, in the administration of the federal tax laws, has followed the *Ithaca Trust* principle recognizing the validity of valuations made by use of actuarial tables. The regulations promulgated under Section 2031 include the actuarial tables to be employed for estate and gift tax purposes. Moreover, in Rev. Rul. 80-80, 1980-1 Cum. Bull. 194, the government reaffirmed its long-held position that actuarial tables "are to be used in valuing annuities, life estates, terms for years, remainders, and reversions", stating at page 194:

> "The actuarial tables in the regulations are provided as an administrative necessity, and their general use has been readily approved by the courts. See *Ithaca Trust Company v. United States*, 279 U.S. 151 (1929); ***"

The ruling, after reviewing a series of cases considering when departure from use of the tables was proper, enunciated the following principle at page 195:

> "In view of recent case law, the resulting principle is as follows: the current actuarial tables in the regulations shall be applied if valuation of an individual's life interest is required for purposes of the federal estate or gift taxes unless the individual is known to have been afflicted, at the time of transfer, with an incurable physical condition that is in such an advanced stage that death is clearly imminent. Death is not clearly imminent if there is a reasonable possibility of survival for more than a very brief period. ***
>
> "The above principle is applicable to every situation that involves valuation of an interest that is dependent upon the life of one or more individuals for federal estate or gift tax purposes, including valuation with respect to deductions allowable under section 2055 or section 2522 of the Code, with the exception of determinations involving a

decedent's own life expectancy under sections 2037 and 2042(2)."

In the case at bar, it is clear that, at Ada's death, James's death was not so imminent as to bring the case within the exception set forth in Rev. Rul. 80-80. (App. at 10a, 11a). In none of the proceedings below did the Commissioner so contend. The ruling's general principle is that, with the exception of certain sections not pertinent herein, the actuarial tables must be used in "every situation that involves valuation [of an annuity] for federal estate and gift tax purposes, including [but not limited to] valuation with respect to deductions allowable under section 2055 or section 2522 of the Code". Therefore, by the government's own ruling, the valuation of James's claim for a lifetime annuity must be made, for purposes of Section 2053, by use of its actuarial tables.

B. The Commissioner, in attempting to avoid the clear mandate of *Ithaca Trust*, contends that the Court of Appeals decision below conflicts with those of a number of other circuits. An analysis of the cases relied upon by him (petition at 5-13), however, discloses (i) that all of them are factually distinguishable from the case at bar, and (ii) that none dealt with the issue of valuation presented herein.

Section 2053(a)(3) provides an estate tax deduction for such amounts of "claims against the estate • • • as are allowable by the laws of the jurisdiction • • • under which the estate is being administered." The regulations promulgated thereunder specify that claims, to be deductible, must "represent personal obligations of the decedent existing at the time of his death." Moreover, "[o]nly claims enforceable against the decedent's estate may be deducted." Treas. Reg.§ 20.2053-4.

Section 2053 also allows a deduction for funeral expenses and administration expenses. As in the case of claims which are unmatured, contingent, or disputed at the date of death, those expenses are inherently dependent upon post-death facts to determine whether, and to what extent, they are "allowable".

The threshold issue, then, in determining the deductibility of a claim is its "allowability" or "enforceability" against the decedent's estate. The facts in this case clearly demonstrate that James's claim met those tests (App. at 2a, 10a), and the Tax Court below noted that this case presented the single issue of the proper valuation of an allowable and enforceable claim for a lifetime annuity (App. at 14a).

The Commissioner, from the voluminous precedents cited in the proceedings below, gleaned five Court of Appeals decisions which he urges are in conflict with the Court of Appeals decision herein. Two other decisions, including a Ninth Circuit decision cited in this case, were discussed in the petition (petition at 5-9). None of those cases, however, involved an enforceable claim where, as here, the only post-death factor to be evaluated is the death of a measuring life.[3]

The seven Court of Appeals decisions discussed at pages 5 through 9 of the petition, none of which involved a claim which was contingent, unmatured, or disputed at the date of death, arrange themselves into two distinct categories. The first encompasses claims valid and enforceable at the date of death which were subsequently reduced or eliminated by the voluntary action of the affected party. The second category contains enforceable claims which were compromised after death. There is disagreement among the circuits within each category as to whether post-death facts are to be considered in determining the amount deductible under Section 2053 (and its predecessor sections) of the Code.

The following Court of Appeals decisions held that post-death facts are to be considered in valuing a deductible claim where, following death, the claimant's voluntary actions affect the estate's obligation to the claimant: *Commissioner v. Estate of Shively*, 276 F. 2d 372 (2d Cir. 1960) (alimony claim

[3] Unlike the factual patterns developed in the Court of Appeals decisions relied upon by the Commissioner, James's claim herein was valid and enforceable at Ada's death *and* was fully enforced and paid in accordance with its precise terms.

was payable for life or until remarriage; widow chose to and did remarry prior to estate tax return due date; deduction was held to be limited to amounts actually paid); *Estate of Hagmann v. Commissioner*, 60 T.C. 465 (1973), aff'd per curiam, 492 F. 2d 796 (5th Cir. 1974) (no deduction was allowed where, following death, no claims for valid debts were filed against the estate and no amounts were paid by the estate); and *Jacobs v. Commissioner*, 34 F. 2d 233 (8th Cir. 1929), cert. denied, 280 U.S. 603 (1929) (no deduction was allowed where, following death, claimant abandoned contractual claim in favor of rights under decedent's Will). In *Commissioner v. Strauss*, 77 F. 2d 401 (7th Cir. 1935), opinion withdrawn, 81 F. 2d 1016 (7th Cir. 1936), the Court of Appeals for the Seventh Circuit sustained a full deduction for a claim on facts substantially similar to those in *Estate of Hagmann v. Commissioner, supra.*

In the second category, which involves post-death compromises of claims, the following Court of Appeals decisions held that post-death facts are to be considered in valuing claims: *Commissioner v. State Street Trust Co.*, 128 F. 2d 618 (1st Cir. 1942) (alimony claim under court decree was for life, subject to modification upon remarriage; estate, following compromise of alimony claim, was allowed a deduction measured on the amount provided in the compromise agreement); *Estate of Metcalf v. Commissioner*, 7 T.C. 153 (1946), aff'd by order, 47-2 U.S. Tax Cas. (CCH) ¶ 10,566 (6th Cir. 1947) (liens against decedent's real property were compromised for reduced amounts; estate's deduction was limited to amounts paid). The Ninth Circuit, in a decision cited in its own opinion below, determined that a decedent's estate was entitled to a deduction for the full date of death value of a certain and enforceable lien claim against estate real property, notwithstanding the fact that the claim was subsequently settled by the estate for a reduced amount. *Propstra v. United States*, 680 F. 2d 1248 (9th Cir. 1982).

As demonstrated above, not one single Court of Appeals case has considered the issue herein presented — the valuation of a life annuity claim where the only post-death factor is the death of the claimant. Therefore, there can be no conflict between the decision of the Ninth Circuit below and those of other circuits which, for its resolution, requires that this Court grant the Commissioner's petition for writ of certiorari.

C. In a final and futile attempt to avoid the *Ithaca Trust* precedent, the Commissioner has contended that the Court's decision has limited applicability — that it applies to cases involving valuation of charitable, but not other, deductions (petition at 13). The same argument was made unsuccessfully to the Tax Court below, which declared with great perception:

> "It is one thing to distinguish *Ithaca Trust* in cases involving enforceability of a claimed debt, but to distinguish it here would be to distinguish it to the point of extinction." (App. at 22a).[4]

II. THE UNIQUE FACTS OF THIS CASE DO NOT PRESENT AN IMPORTANT QUESTION REQUIRING FURTHER ILLUMINATION BY THIS COURT.

As observed in Part I, during the 57-year period since *Ithaca Trust* was decided, only one reported federal case, *Estate of Lester v. Commissioner*, 57 T.C. 503 (1972), involving the valuation of an enforceable claim against an estate, presented a factual pattern substantially similar to the one here under review. The unique facts in this case are (i) an

[4] The position urged by the Commissioner here is at odds with the one he took in *Estate of Lester* where he argued *for* the applicability of actuarial tables in valuing claims against the estate. Perhaps the rule for which the Commissioner is advocating is better expressed as follows: The use of actuarial tables in valuing claims against the estate is proper if it is favorable to the government; valuation by actuarial tables is not proper if the tables do not favor the government.

enforceable alimony claim for a lifetime annuity which will terminate *only* upon the claimant's death (and not upon any other occurrence), and (ii) the termination of the estate's obligation to pay the lifetime annuity by the death of the claimant prior to the estate tax return date.

The Commissioner, contending that the question presented has administrative significance, claims that 43 cases similar to the case at bar involving more than $6 million in tax revenues are currently pending (petition at 15). The facts of those cases are not disclosed, so it is impossible to comment on them with particularity. In view of the dearth of past precedents involving the facts herein presented, however, it is very likely that those cases involve other issues (allowability or enforceability of a claim; valuation of an enforceable claim where factors other than the death of the claimant must be evaluated) which have been the subject of extensive litigation since the decision in *Ithaca Trust* was rendered.

The question herein presented is a pure valuation issue, and reported cases involving that issue alone are very rare. When a claim is for a sum certain, the amount of the claim itself resolves the valuation issue. When a claim is for a lifetime annuity, actuarial tables provide the recognized method for determining the claim's sum certain value. *Ithaca Trust*, in which this Court validated the use of actuarial tables to value lifetime rights to periodic payments, remains a viable and sufficient precedent. This case falls squarely within the *Ithaca Trust* rationale, and the question presented neither requires nor warrants further illumination by this Court of the principles it enunciated more than a half century ago.

III. RATIONAL AND EVEN-HANDED TAX ADMINISTRATION WOULD BE SIGNIFICANTLY IMPAIRED IF THE *ITHACA TRUST* RULE WERE LIMITED OR ALTERED AS ARGUED BY THE COMMISSIONER.

In the system of estate tax administration, actuarial tables have long provided the recognized method for valuing

annuities, life estates, terms of years, remainders, and reversions. *Ithaca Trust Co. v. United States,* 279 U.S. 151 (1929), confirmed the appropriateness of the actuarial valuation method which provides needed certainty and facilitates settlement of estates as of the decedent's death. The government's regulations under Section 2031 of the Code contains the tables applicable in the estate tax context, and Rev. Rul. 80-80, 80-1 Cum. Bull. 194, underscores the government's position that the tables are applicable in a wide variety of contexts, including the valuation of claims. (Also, see *Estate of Lester v. Commissioner, supra.*)

Application of actuarial tables, being based upon statistical averages, sometimes favors the government (e.g., *Ithaca Trust; Estate of Lester*), and in other instances their use favors the taxpayer (e.g., *Chauncey Stillman v. Commissioner,* T.C. Memo 1965-94, 24 TCM 478 (1965), where a gift tax deficiency in excess of $900,000 turned on whether the donated contingent remainder was to be valued actuarially or by recognition of the fact that the life tenant died within two months after the making of the gift and before the gift tax return was filed). The actuarial tables encompass the lives of all individuals, including those who die shortly after the valuation date and those who far outlive their life expectancies. It is their statistical breadth and uniform application, regardless of "windfall" or "detriment" in a particular case, which validate the use of those tables. This very point was emphasized in *Estate of Chauncey Stillman, supra,* where the Tax Court stated:

> "The use of mortality and actuarial tables in valuing a future interest dependent upon a life estate involves the use of established computations which seldom accurately predict the future in a particular situation or accurately determine value in a particular case, but the use of such established computations proves to be substantially correct when used in a great number of instances under the law of

averages; and the respondent's [the Commissioner's] position is that he deals with a great enough number of different taxpayers to eventually receive the benefit of the process of averages." 24 TCM at 503.[5]

In seeking a review of the Ninth Circuit decision below, the Commissioner is asking that this Court overturn or alter the principles it enunciated in *Ithaca Trust* — principles which have been the logical underpinnings of a rational system of tax administration for more than fifty years. If the Commissioner's position were sustained, current actuarial tables, based on all lives in being at death, would require revision to exclude from lives upon which they are based those persons who die within some "hindsight period". The length of the period will have to be defined — whether it expires on (i) the due date of the estate tax return, (ii) the date on which the tax liability is finally determined, (iii) the date on which the statute of limitations for estate tax deficiency assessments runs, or (iv) some other date. Whatever date is selected would impair the ability to settle estates "as of the date of the testator's death".

If the Commissioner is not seeking a revision of his own actuarial tables, he must instead be urging this Court to fashion an exception to its own reasoning in *Ithaca Trust* — that, at least in the valuation of claims, departure from the tables is proper where it produces a result favorable to the government. Such an exception would create a double standard — one set of rules for taxpayers, another for the government. Fairness, tax equity, and even-handed tax administration are cornerstones of public confidence in our system of taxation, and the exception urged by the Commissioner — which is unfair and illogical — would seriously and unnecessarily undermine that confidence. (See *Estate of*

[5] Individual taxpayers have less opportunity to derive the benefit of the process of averages than does the Commissioner — less opportunity to recoup if application of actuarial tables in a particular instance produces a favorable result for the government.

Lester v. Commissioner, 57 T.C. 503 (1972), where the Commissioner was the beneficiary of the valuation of a claim by use of actuarial tables.)

The cause of orderly tax administration has been admirably served by the principles established in *Ithaca Trust.* — (i) that a decedent's estate should be settled as of a decedent's date of death, and (ii) where death of the measuring life is the sole factor affecting valuation, actuarial tables must be used. The Commissioner has demonstrated no logical or compelling reason for overturning those principles to reach the result which he urges herein.

IV. CONCLUSION.

For the reasons stated, the Court should deny the Commissioner's petition for writ of certiorari.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1983

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF ADA E. VAN HORNE, DECEASED,
ROBERT L. FARMER AND RICHARD R. COLE, EXECUTORS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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1. Respondent concedes (Br. in Opp. 8-9) that the circuits are in conflict as to the relevance of post-death events in determining the validity and amount of claims against the estate generally, at least where the post-death event is the creditor's settlement, compromise or nonpresentation of his claim, or some other "voluntary action" (*id.* at 8) on the creditor's part. Respondent likewise concedes (*id.* at 8-9) that the circuits are in conflict as to the deductibility of alimony claims in particular, at least where the post-death event is the surviving spouse's remarriage or waiver of the claim. Yet respondent contends (*id.* at 8-10) that this case does not present the conflict because it is "factually distinguishable" (*id.* at 7) from the other cases. The post-death event here, respondent emphasizes, is the surviving spouse's death, an event not generally regarded as constituting "voluntary action" on a creditor's part.

As noted in our petition (at 6 n.3), this is a distinction without a difference. Respondent makes no effort to explain why the volitional nature of a post-death event should have any logical effect on its relevance, as a matter of law, in determining the deductibility of a claim.[1] No court that has required consideration of post-death events in valuing claims against the estate has mentioned, much less relied on, the event's "voluntariness" as a basis of decision. Nor has any court that has held post-death events irrelevant for that purpose relied on the event's involuntary character. The Ninth Circuit below certainly did not do so, holding simply "that post-death events [must] be disregarded when valuing legally recognized and enforceable claims against an estate" (Pet. App. 4a-5a (footnote omitted)). Indeed, the Ninth Circuit (*ibid.*) believed its decision here controlled by its prior decision in *Propstra* v. *United States*, 680 F.2d 1248 (1982), a case in which the post-death event was the creditor's voluntary compromise of its claim.

In short, respondent has pointed to no legally significant distinction between this case and the cases cited in our petition (at 5-11). Nor has respondent challenged our contention that those other circuits would have decided this case differently from the Ninth Circuit. Resolution of the conflict by this Court is thus appropriate.

2. Respondent errs in contending (Br. in Opp. 6-7) that the Commissioner's position in this case is inconsistent with his position in Rev. Rul. 80-80, 1980-1 C.B. 194. That ruling considered the circumstances in which "the physical condition of an individual [will] justify departure from using the

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[1]The Tax Court below speculated that the voluntary nature of a post-death event might render an actuarial date-of-death computation difficult, thus necessitating consideration of the events that actually transpire (Pet. App. 23a-24a n.8). We demonstrated in our petition (at 6 n.3) the error of that speculation, and respondent does not appear to rely on it. See Br. in Opp. 10.

actuarial tables to value property interests" (*id.* at 194). The Commissioner concluded that such departure is proper only where the life tenant's death is "clearly imminent," clarifying a previous ruling that had conditioned departure on the life tenant's likely inability to survive "for more than a brief period of time." *Id.* at 195, clarifying Rev. Rul. 66-307, 1966-2 C.B. 429.

Revenue Ruling 80-80 has no application here. It assumed a situation in which resort to actuarial tables would otherwise be proper, and defined an exception to that rule based on the life tenant's health. It did not purport to list all of the situations in which actuarial tables must or may be used in the first instance (1980-1 C.B. at 195). In particular, it did not consider whether resort to actuarial tables would be required or allowed in computing the deduction for claims against the estate under Section 2053(a)(3). Indeed, the ruling does not mention Section 2053, and the introduction (1980-1 C.B. at 194) does not list Section 2053 as a section to which the conclusion stated in the ruling applies. The Commissioner's published position on the question presented here has been clear at least since 1960, when he ruled that "no deduction will be allowed for claims against the estate which have not been paid or will not be paid." Rev. Rul. 60-247, 1960-2 C.B. 272, 274. Nothing in Revenue Ruling 80-80 is inconsistent with that position.

3. Respondent likewise errs in contending (Br. in Opp. 4-6) that the Commissioner's position here is inconsistent with the position he took in *Estate of Lester* v. *Commissioner*, 57 T.C. 503 (1972). In that case, the husband was obligated under a divorce decree to pay his ex-wife $1,000 per month for 130 months or until her death, whichever event first occurred (*id.* at 504). When the husband died, his estate became liable for the remaining monthly payments, which numbered 111 at that time. On its federal estate tax

return, the estate claimed a deduction (on account of the ex-wife's alimony claim) of $111,000 — the undiscounted value of 111 monthly payments, without taking into account the survival contingency. The Commissioner proposed to allow a deduction of only $92,456 — the actuarial value of the ex-wife's alimony claim, reflecting both the survival contingency and the time value of money (*id.* at 504-505). The Tax Court (*id.* at 507) upheld the Commissioner's determination.

The Commissioner's position in *Estate of Lester* is not inconsistent with his position here. In *Estate of Lester*, the post-death event relevant to computation of the ex-wife's alimony claim — her death — had not occurred at the time the estate's tax liability was finally determined. In those circumstances, the Service, following its usual practice, required that the ex-wife's claim be valued actuarially.[2] In this case, by contrast, the relevant post-death event *has* occurred, and the question is whether the actuarial value of the claim should be deductible even though a lesser amount was actually payable and actually paid to discharge the claim in full.[3]

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[2]See, *e.g.*, Rev. Rul. 71-67, 1971-1 C.B. 271 (holding that an estate may deduct the actuarial value of a support claim where the terminating event — the surviving spouse's death or remarriage — has not occurred).

[3]As an alternative argument before the Tax Court, the taxpayer in *Estate of Lester* noted that it had actually discharged the ex-wife's claim by purchasing an annuity at an aggregate cost of $102,700, and contended that it should be allowed to deduct this sum rather than the actuarial amount ($92,456) determined by the Commissioner (57 T.C. at 506). The Tax Court rejected this contention without discussion (*id.* at 507), and did so correctly. When the taxpayer in *Estate of Lester* purchased the annuity, the divorce decree that had originally created the ex-wife's claim was amended to permit satisfaction of her claim by purchase of an annuity, and to add her son and grandson as secondary beneficiaries in the event of her premature death (*id.* at 505). Thus, not only did the estate's actual payments to the ex-wife exceed the amount theoretically due her, but the payments were made pursuant to a claim that was different from that which existed at the time of the husband's death.

4. Respondent notes correctly (Br. in Opp. 11-13) that, if the Commissioner's position on the question presented is ultimately sustained, certain ancillary questions of a practical nature — *e.g.*, the cut-off date for considering post-death events in valuing claims against the estate — will also have to be considered, either in this case or in other cases. Many of these questions, we think, can be answered by reference to the regulations' existing procedures respecting estimated deductions generally. See Pet. 10-11. In any event, respondent's observation has no bearing on the propriety of granting certiorari to resolve the conflict in the circuits. This Court can resolve that conflict by deciding, in principle, whether post-death events are relevant in determining the validity and amount of claims against the estate. If the Court were to sustain the Commissioner's position, ancillary questions not reached below could be considered on remand, by the courts in other cases, or by the Commissioner as an administrative matter.[4]

For the foregoing reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

MAY 1984

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[4]Respondents' assertions as to the alleged unfairness of the Commissioner's position (Br. in Opp. 11-12) raise questions more appropriate for consideration in a brief on the merits. In essence, they are contentions about how the conflict in the circuits should be resolved, rather than about whether it should be resolved.